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FEDERAL COMMUNICATIONS COMMISSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WT Docket No. 96-199
Amendment of Part 90 Concerning the Commission's Finders Preference Rules	)	

To: The Commission

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COMMENTS OF SMR WON

SMR WON, by its attorney, submits the following comments in response to the Commission's Notice of Proposed Rule Making (NPRM), released September 27, 1996, in the above-captioned proceeding. SMR WON is an industry association of numerous Specialized Mobile Radio Service (SMR) operators. It represents many of the smaller SMR systems currently licensed by the Commission.

SMR WON's position is that all pending finder's preference requests should be processed expeditiously to grant or denial on the basis of their merits. SMR WON believes that any pending finder's preference requests that lacks merit (e.g., those involving minor discrepancies in geographical coordinates) can be dismissed, so long as all pending finder's preference requests are processed on their individual merits. Anything less would be violation of the basic principal that an agency's rules should not changed retroactively to the disadvantage of those who relied upon its then-effective rules.

The Commission's intention in establishing the finder's preference program in 1991 was to aid the Commission in locating and reclaiming frequencies that were licensed but not being used, particularly those that were being "warehoused" by the licensee for future use. The Commission itself determined that it simply did not have the resources to constantly monitor each licensed SMR station to ensure that it was actually in operation and providing service to the public. In return for assisting the Commission in identifying unused frequencies, the person

who successfully documented the non-use of the frequencies was given a preference in filing for the frequencies.

There is a substantial backlog of finder's preference filings that have not been acted upon by the Commission. Some of SMR WON's members have been waiting for more than two years for Commission action on their requests. Others have been waiting for the FCC to dispose of finder's preference filings against their stations. But whether a member has filed a finder's preference request, or has had such a filing made against its facilities, the long delay in Commission action on these requests has delayed the reassignment of the frequencies for much needed facilities or has raised a cloud over the status of their constructed and operational facilities, creating an uncertainty which is intolerable for business, financing and provision of new services for the public.

The Commission inaction on the pending applications has deprived the public of valuable and needed services, competition has been reduced, equipment manufacturers have lost sales, and the economy has been negatively impacted. These problems in the finder's program must not overshadow the positive effect and the need for continuance of site specific frequencies. The Commission should more stringently apply its guidelines and requirements for proof of non-construction.

In WT Docket No. 96-199, the Commission proposes to eliminate the finder's preference program for frequencies in the 220-222 MHz band, in light of the Commission's decision to license stations in this band in the future by auction, and to give any reclaimed frequencies to the auction winner. This would eliminate the incentive for anyone other than the auction winner to assist the Commission in reclaiming unused spectrum.

SMR WON's interest in this proceeding is directed to the Commission's request for comments on whether the finder's preference program should be eliminated in its entirety. Furthermore, the Commission has indicated that it intends to retain the discretion to dismiss pending finder's preference requests for any service in any frequency bands for which it decides

to eliminate the finder's preference program as a result of this rulemaking proceeding. NPRM at 11.

In the *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making* in PR Docket No. 93-144 (*FOR&O*), released December 15, 1995, the Commission announced that it would no longer accept applications for new finder's preference awards in the 800 and 900 MHz SMR band. This rule making adopted market area licensing for the upper 200 Specialized Mobile Radio (SMR) channels, and proposed similar regulations for the remaining SMR channels. The revised regulations would give any reclaimed 800 MHz or 900 MHz channels to the auction winner for the spectrum block, thus eliminating the incentive for anyone other than the market area licensee to request a finder's preference for the SMR frequencies.

SMR WON believes that the Commission should retain the finder's preference program for single site SMR licensees, since this is the only option for many licensees to expand their systems and to continue to provide the commercial services that their customers demand. Regardless of whether the Commission does so, however, it should at least expeditiously complete the processing of any finder's preference requests that were filed prior to the adoption of the *FOR&O*.

SMR WON is aware that numerous frivolous finder's preference filings may have been made before the Commission clarified the minimum threshold conditions for filing such requests in its Fred B. Lott and Lawrence E. Vaughn, Jr Orders.[1] In these Orders, the Commission affirmed that the finder's preference program was limited to rule violations that lend themselves to conclusive and expeditious action. For example, in the Vaughn case, the FCC stated that with respect to a variance from authorized coordinates, the Commission would award a finder's preference only when a finder demonstrates that the authorized coordinates are more than 1.6

[1] In the Matter of Fred B. Lott, Mimeo No. DA 93-1596, released January 11, 1994, and In the Matter of Lawrence E. Vaughn, Jr., Mimeo No. DA 94-903, released August 18, 1994.

kilometers from the actual location of the station. Now that these clarifications have been issued, the Commission can and should promptly review the pending finder's preference requests involving such minor inconsistences in the station licenses discussed in these cases, and promptly dismiss those filings that do not meet the test described in these Orders.

SMR WON is concerned that the Commission may use the rule making proceeding in WT Docket No. 96-199 to eliminate the finder's preference program generally; and to then dismiss all pending finder's preference request in any frequency band, regardless of the frequency band involved. The finder's preference filings represent an investment of substantial time and expense on the part of small SMR operators for whom the finder's preference program is the only means to find additional frequencies to expand their SMR systems, or to file for new SMR systems. It is patently unfair for the Commission to dismiss applications that were consistent with Commission regulations at the time of filing, simply because the Commission may decide to change its regulations long after such filings were made.

It is well settled that the retroactive application of administrative rules and policies is looked upon with disfavor by the courts. See Bowen v. Georgetown University Hospital, 488 U.S. 208 (1988); Yakima Valley Cablevision v. FCC, 794 F. 2d 737, 745 (D.C. Cir. 1986)("Courts have long hesitated to permit retroactive rule making and noted its troubling nature.") When implementing regulations or policies with retroactive application, the Commission must balance the "mischief" caused by such regulation against the "salutary" or beneficial effects, if any, which reviewing courts, in turn, must critically review on appeal to ensure that competing considerations have been properly taken into account. Id., 794 F. 2d at 745-46; see Securities and Exchange Commission v. Chenery, 332 U.S. 194, 203 (1947).

The mischief to be caused by retroactive dismissal of pending requests is substantial. SMR WON's members have invested considerable time and effort, paid FCC filing fees, and many have now waited for several years for the Commission to grant their requests and allow them to apply for the frequencies they have identified as unused. Dismissing pending finder's

preference requests would penalize persons and small companies whose timely filed requests are still pending, and would have been granted but for the inordinate delays in processing pending finder's preference filings.

Also, for those who have waited for over two years to have frivolous finder's preference filings against their stations dismissed, the Commission's inaction has resulted in loss of customers and inability to attract new customers due to the cloud on their licenses. And by refusing to process erroneous requests, the Commission only extends the cloud over valid licenses which have been challenged, since dismissal of the request does not resolve the allegations underlying it.

Against the mischief involved in dismissing all pending finder's preference requests without consideration of their merits, there would appear to be little offsetting benefit. It appears that by this action the Commission simply wants to "clear the decks" so that it may proceed with spectrum auctions without the baggage of numerous claimants for the frequencies to be auctioned, which may depress the amount auction participants are willing to bid for the spectrum. However, increasing potential auction revenue as a regulatory goal contravenes Sections 309(j)(7)(A) and (B) of the Communications Act of 1934, as amended, which prohibits the Commission from making spectrum allocations and designing regulations based "on the expectation of Federal revenues" from the use of auctions. "[A]n agency rule would be arbitrary and capricious if the agency had relied on factors which Congress has not intended it to consider, . . . " Arent v. Shalala, 70 F. 3d 610, 616 (D.C. Cir. 1995). Since Congress has expressly forbidden the Commission from making decisions based on potential auction revenues, dismissal of finder's preference requests for this purpose would be arbitrary and capricious. Moreover, dismissal of finder's preference requests will save little time, since the Commission will nonetheless have to resolve prima facie issues raised against existing licensees in order to have certainty in the bidding process.

Furthermore, any across-the-board dismissal of the pending finder's preference requests

would lead to appeals by the applicants. The resulting delays in availability of the frequencies for legitimate requests and the cloud that would continue on the validity of the station license against whom frivolous requests have been filed would further delay service to the public. Rather, the Commission should process the pending requests expeditiously, dismiss those that are frivolous, and promptly issue awards to those who have made a valid demonstration of the non-use of the frequencies requested.

SMR WON and its members have maintained their belief that the auctioning of occupied spectrum is not in the public interest. The association has been working with other industry groups and wide area operators over the last two years to form a compromise solution to reduce the deleterious impact of geographic licensing and auctions to small business. The "industry consensus," as it has been so called, has been presented to the Commission. It has been openly supported by Congress. The industry now anxiously awaits the Commission's decision. The pre-auction market settlement proposed by the consensus group is consistent with Congressional intent to use auctions only in the case of mutual exclusivity.

Participants in the proposed market settlement would be disadvantaged by dismissal of legitimate finder's preference requests. Frequencies acquired through finder's preferences can be considered "chips" which the smaller operators can use to participate in the regulatory game, a game where the rules were written after wide area operators stockpiled most of the playing pieces through waivers, close spacing, aggregate loading, wide area footprints, and enormous amounts of money generated through the sale of stock.

Frequencies acquired through finder's preferences are essential for the continued growth and development of systems and services provided by small business. The Commission's suggestions that it would be acceptable to dismiss the pending finder's preference because a person could apply for geographic licenses covering the unused frequencies is inconsistent with reality. If the Commission dismisses the finder's preferences, then either the Commission must take time to resolve the merits of each request; or the target station's contours would be

validated and protected, even if the finder applied for the frequency and won at the auction. If the target's station is not constructed, the area within the contour would go unserved until the Commission cancelled the license.

For that matter, pending finder's preference applicants can take little comfort in the Commission's indication that they are free to participate in the upcoming auction. There is no assurance than an incumbent or finder can win if he or she participates in an auction, particularly if the bid is against industry giants and publicly traded companies. Currently, those applicants that have demonstrated non-construction or improper operation by an incumbent licensee have an expectancy that they will receive the forfeited spectrum. Given the severe harm which would be caused to existing finder's preference applicants, and their strong reliance on the present standard, the proposed dismissal of their requests would fail the balancing test for retroactivity discussed above. See Retail, Wholesale & Department Store Union, AFL/CIO v. NLRB, 466 F. 2d 380, 390 (D.C. Cir. 1972). The Commission must consider the less restrictive alternative of processing existing finder's preference requests, and auctioning 800 MHz spectrum after the resolution of these requests. See Telocator Network of American v. FCC, 691 F. 2d 525, 537 (D.C. Cir. 1982).

In this regard, SMR WON respectfully disagrees with the Commission's conclusion that "persons with finder's preference requests on file would not be substantially harmed." SMR WON's members have invested considerable time, effort and money in the submission of the finder's preference requests. Expenses include FCC filing fees, consultant fees and fees for legal representation.

Many operators have now waited for several years for the Commission to grant their requests and allow them to apply for the frequencies they have identified as unused. Blanket dismissal of legitimate finder's preference requests which are supported with clear and uncontrovertible evidence would be unfair, arbitrary and capricious. The Commission would be favoring those who had their applications processed.

The Commission and the public interest would be better served by promptly dismissing all pending cases that are flawed, contrived, or marginally supported. If the Commission dismisses legitimate finder's preference requests on stations that were not legitimately constructed and providing service to the public, it is likely that appeals would follow. The affected applicants would rightfully seek relief, compounding the problem of cleaning up for the auctions. The auction process cannot proceed with unresolved issues on the table. Bidders wouldn't know that they were bidding for, which would increase the likelihood that injunctions would be filed to block the auctions until the finder's preference issues are resolved.

SMR WON therefore strongly urges the Commission to honor its obligations to the diligent efforts of finder's preference applicants who have expended considerable resources in reliance on Commission regulations for obtaining a preference on reclaimed spectrum. These requests should be processed in accordance with regulations in place at the time the requests were filed. If successful, the finder's preference applicant should receive an award, a reasonable period of time to file its application, and the same grandfathered rights as other licensees who were licensed prior to the FCC rule changes.

Respectfully submitted,

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